

PLANNING BASIC TRAINING:

Ethics and Land Use - A Primer for Zoning and Planning Board Members

Ethics & Land Use: A Primer for Zoning and Planning Board Members

by Richard Johannesen, Esq.¹ & Steve Fiore-Rosenfeld, Esq.²

- I. Introduction: Why so much interest in land use ethics?
 - A. Corruption
 - B. Media
 - C. Community Awareness
- II. Who should be appointed to Planning Board & Zoning Board of Appeals?
 - A. Who shall serve? *by C. Gregory Dale*
 1. Fair, objective & unbiased decision maker.
 2. Community should identify basic parameters of the selection of new board.
Example: Brookhaven Town proposal and Affiliated Brookhaven Civic Organization (ABCO) recommendations.
 3. No “political cronies”.
Question: How can political process of selecting board members exclude political cronies?
 - B. *Goal:* “To create a mix of reasonable, fair minded people with the integrity to act in the long term public interest of the community as a whole.” *C. Gregory Dale*
- III. Who do you work for? *by C. Gregory Dale*
 - A. DO NOT represent any special interest (Builders, Environmentalists, etc.)
 - B. DO NOT represent “voice” of elected official
 - C. DO NOT represent political party
 - D. Your position should:
 1. NOT be used to seek political favors
 2. NOR should it create a perception you are seeking political goodwill in you action(s).
 - E. *American Planning Association’s Statement of Ethical Principles in Planning:* “Planning process participants should exercise fair, honest & independent judgment in their roles as decision makers and advisors.”
- IV. What is a Land Use Ethics Checklist?

10 Point Checklist *by Prof. Patricia Salkin - Albany Law School - Rocky Mt. Land Use Inst. 2002*

 1. Have you reviewed a copy of the state ethics law in effect during the last 12 months?
 2. Have you reviewed a copy of local ethics law in effect during the last 12 months?
 3. Does your business relate in any way to issues which may come before the board on which you sit?
 4. Could your business potentially benefit from or be harmed by a decision of the board on which you serve?
 5. Are you or a member of your immediate family licenses or engage in any of the following professions which may cause you, your firm, or a family member to appear before the board on which you serve:
__ architect __ attorney __ builder, developer __ engineer __ land surveyor
__ mortgage broker/ agent __ realtor __ title insurance company
__ subcontractor for work on new construction/ remodeling
 6. Do you hold investments in real estate within the municipality on whose board you serve?
 7. Do you have stock or any other type of ownership interest (including a silent limited partnership interest) in any company or organization which may appear before the board on which you serve?
 8. Are you related to, or in a business or professional relationship with, another municipal official on a different board or in an office where either position may review the decisions of the other?

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9. Are you comfortable and conversant with the municipal/board policies on conflicts of interest, recusal from deliberations, and recusal from voting?
10. Do you know where to go to get answers to ethical questions in a timely fashion?

V. New York State's Ethics Law

- A. *General Municipal Law Article 18.*
Conflicts of Interest of Municipal Officers and Employees
§800. Definitions
§801. Conflicts of interest prohibited
§802. Exceptions
§803. Disclosure of interest
§804. Contracts void
- B. Criticism of current state statute
 1. NYS Legislature failed to pass amendment.
 2. Does not consider ethical issues unique to land use.

VI. Conflict of Interest *by C. Gregory Dale*

VII. Gifts *by C. Gregory Dale*

VIII. Ex Parte Communications

IX. Behind the scenes advocacy *by C. Gregory Dale*

X. Site Visits - 8 Guidelines *by Ken Lerner, Assistant Planning Director, City of Burlington, VT.*

Site Visit Guidelines:

1. Site visits should be conducted with a staff person in charge, not the applicant, [boardmember], or neighbor.
2. The [board] chair and/or staff should explain the purposes and rules of the site visit at the beginning of the site visit to prevent misunderstandings.
3. The purpose of the site visit is to familiarize the [boardmembers] with the site and how the proposed project fits into the site; it is not a hearing; statements and questions from neighbors should be presented at the hearing so that these can become part of the record; if the applicant is willing, questions can be addressed to him or her at the end of the site visit.
4. Neighbors should refrain from side conversations with [boardmembers]; this could be considered an ex-parte contact and result in a [boardmember] not being able to act on a project.
5. [Boardmembers] should refrain from offering suggestions or opinions about the project during the site visit; such discussions should occur at the specific meeting or hearing scheduled on the project.
6. Specific [boardmembers] concerns should be directed to staff so these concerns can be researched and addressed prior to action by the [boardmember].
7. Abutters and other neighbors are encouraged to put their concerns in writing for the [boardmember] in advance of the scheduled meeting or hearing.
8. Staff should prepare a brief summary of the site visit as part of the record (which [boardmembers] attended, etc.).

Who Shall Serve?

One of the challenges in the long-term health of a planning commission is the appointment of commission members who are best able to serve the public interest. Naturally, the background of potential members is an important factor in the selection process. But to what extent should the past involvement of potential commissioners in “special interest” groups pose a problem?

Consider the following scenario. Your city council is in the process of appointing two new commissioners. The mayor and council have developed a list of potential candidates. Among them, a developer who has been an officer in the local homebuilders association, and an environmentalist who has been active in a local “save open space” organization. Each has appeared before the planning commission in the past.

The mayor and council are soliciting advice as to the most appropriate candidates. You question the wisdom of appointing those who have been active in special interest groups dealing with planning and zoning issues. You are concerned about future conflicts of interest and also troubled by having “special interest advocates” serve on the planning board.

Are there good reasons for your concerns? Should communities avoid appointing individuals who have been involved with special interest groups?

There are several broad issues raised by these questions:

1. *Should the planning commission reflect the prevailing values of the community?*
2. *What is the community, through its governing body, trying to achieve in the way it structures its planning commission?*
3. *What message is being sent to the public?*

Let me deal with these questions one at a time. First, the role of the planning commission is to be a fair, objective, and unbiased decision-maker and advisor to the legislative body. It is the job of the planning commission to consider the

PUBLIC INTEREST VS. SPECIAL INTEREST

by C. Gregory Dale, AICP

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long-range consequences of decisions for the community as a whole. The planning commission should be the one body in the community that is above the political fray – and should be as fair and free of bias as possible. While special interest groups should and will be heard in the planning process, the role of the planning commission is to go beyond special interests and consider the broader public interest.

Of course, each member comes to the planning commission with a certain set of values. In this regard, those who feel strongly about the protection of the environment or the promotion of economic development are really no different than those who feel strongly about residential protection. No one expects planning commissioners to ignore their values, but we do expect them to rise above biases and consider all issues objectively in light of the long-range community wide perspective. The mere fact that someone has been a member of a special interest group and shares its values does not necessarily create a problem.

Diversity of opinion and even good faith disagreements over issues can be healthy. After all, the community as a whole encompasses many different viewpoints, so why shouldn't the planning commission? In fact, a number of communities require the commission to include members with certain backgrounds (e.g., architects and engineers).

However, these provisions are intended to ensure certain expertise, not to benefit special interests.

This leads to the second question: what are we trying to achieve in the way we structure our planning commissions. It makes sense for a community to identify some basic parameters for the selection of new commissioners. For example, a list of desirable characteristics of new commission members might include the following: capable of being objective and fair; knowledgeable about local issues; willing to work hard; above ethical reproach; and able to place long-term community-wide interests above special interests.

Obviously, there will be more factors that are important in your community – and any list might vary from community to community – but it is important for the appointing body to know what it is trying to accomplish *before* selecting individuals to serve on the planning commission.

The final issue relates to the message being sent to the public. If a planning commission is perceived as simply being a group of “political cronies” that will do whatever the “politicians” say, then it will be an ineffective community institution. On the other hand, a planning commission perceived as being interested in the long-term health, viability, and livability of the community, can establish itself as a respected voice.

Let me wrap up by making five brief points.

1. There is nothing *inherently* wrong with appointing planning commission members who have been active in special interest groups. The key question is whether the individual is likely to place the long-term broad public interest above those special interests – and treat everyone fairly and without bias.

2. The community should exercise some common sense in balancing planning commission appointments. For example, if there is a member with an environmental advocacy background, it may make sense to balance this point-of-

view with someone having an economic development background.

3. Consider the practical issue of future conflicts of interest. While involvement in special interest groups may not create actual conflicts of interest (since they usually do not involve personal financial interests), legitimate concerns about bias may arise. For example, if many zoning cases involve environmentally sensitive properties in which either an environmental or a development-oriented group has a vocal interest, then a commissioner who has been active in either group may have to abstain repeatedly. Frequent abstentions can make it more difficult for a commission to function effectively.

4. The nature and timing of special interest involvement should be considered. Appointing a current officer of a group that is directly interested in planning issues may raise more concerns than appointing a mere member or a former officer who has had a relatively low profile.

5. Be conscious of public perception. If a potential candidate is widely perceived as being a "firebrand" for his or her cause and unlikely to act in an unbiased way, then appointing such a person may not be wise.

Above all, be guided by the need to create a mix of reasonable, fair-minded people with the integrity to act in the long-term public interest of the community as a whole. Strive to create an environment where the planning commission can be the non-political body it is designed to be. ♦

C. Gregory Dale is a Principal with the planning and zoning firm of McBride Dale Clarion in Cincinnati, Ohio. Dale manages planning projects and also regularly conducts training for planning officials throughout the country. He is also a former President of the Ohio Chapter of the American planning Association.



Resources:



Several articles in past issues of the PCJ –

available for downloading from our web site – also deal with different aspects of planning board membership, and with conflict of interest issues. To locate the article, read excerpts, and download (there is a small fee for article downloads) type the article number listed below in the search box on the top of our main page: www.plannersweb.com

- *Behind the Scenes Advocacy* (article 496)
- *Commissioners as Neighborhood Advocates* (article 336)
- *Homogeneous Commissions in Heterogeneous Communities* (article 222)
- *Caution: Conflicts of Interest* (article 274)



On-Line Comments

"Very timely piece for us in Dearborn County, Indiana. We currently have THREE surveyors on our plan commission. Two were unable to vote at the last meeting because one was working for the project from the beginning and the other was hired to do a traffic analysis for it. This left the board with a lack of quorum (others were on vacation). Talk about a 'hot' crowd! They were not happy when they found out they'd come for nothing."
– Christine Mueller, Lawrenceburg, IN

"In our community, getting people to volunteer for vacancies (let alone be qualified) on boards and commissions is the first battle. Once we get past this hurdle we have to deal with the personalities and objectives of the persons who do the appointing."
– Richard Floyd, past Chairman of the Frederick County, Maryland Planning Commission and current President of the Maryland Citizen Planners Association

"Greg Dale reaches exactly the right conclusions for getting the right balance of expertise and diverse viewpoints on the planning commission. I'm personally not a great fan of trying to engineer any particular sort of 'balance' on the commission, for reasons that

Greg mentions, plus these: (1) All of us have potential indicators of bias that are there for all the world to see – such as our professions – and plenty of other even more consequential indicators that may be known to no one. If my parents had been denied a subdivision of their property long ago, that may influence my planning decisions more than anything that's known to the community; and (2) Some commissioners end up voting in ways that contradict their presumed biases, much as the supposedly conservative Earl Warren headed the most liberal Supreme Court in U.S. history. ... Conscientious, reflective people should never be excluded from appointment to the commission. The message delivered to every potential appointee should say, 'If you've got an open mind, we've got an open slot.'

– David Stauffer, President, Red Lodge, MT Planning/Zoning Commission

"I personally believe it to be inappropriate for a sitting planning commissioner to try to influence the composition of the planning commission by publicly advising the appointing body. If I publicly advocate a candidate who is subsequently not appointed, communication with the person who is appointed may be difficult to non-existent."

– Neill F. McDonald, MAI, Planning Commissioner, Savannah, GA

"I have been an active participant in the development of real estate along the I-5 corridor in Oregon and Washington since 1978. ... When times are too good, the anti-growth people come to power and tighten the reins. As jobs start drying up, the pro-growth people come to power and relax the rules. ... Over the last ten years business leaders have not participated as actively and environmental groups have gained control of committees and commissions. This generally has had a negative impact on providing balanced planning processes."

– Bob Durgan, Vice President Development Services, Andersen Construction, Portland, OR

"I am a member of my Planning Board and Environmental Commission, a post mandated by law. I work very hard to maintain my 'objectivity' and look at the merits of individual applications and ordinances. But I certainly believe it is important to protect the environment. In a town where there is a water allocation ban because our wells are drying up, in a state that expects build out in 20 years, yet with precious natural resources literally in my backyard, I think preserving the environment is important."

– Lisa Voyce, Planning Board Member, Roxbury Township, NJ

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PLANNING COMMISSIONERS JOURNAL / NUMBER 48 / FALL 2002



Affiliated Brookhaven Civic Organization, Inc.

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Memo

To: Supervisor John Jay LaValle

From: Thalia Bouklas, President

CC: Councilpersons Steve Fiore-Rosenfeld, Kevin McCarrick, Geraldine Esposito, James Tullo, Timothy Mazzei, Edward Hennessey, Commissioner Daniel Gulizio

Date: 8/2/2004

Re: Draft Proposal to Amend Planning and Zoning Board Selection Process

ABCO members have reviewed the recently released draft proposal to amend the Town's Planning Board and Zoning Board (attached).

Our comments are interspersed throughout the document in a **bold** font.



Town of
Brookhaven
Long Island

Draft Proposal Amending Planning and Zoning Board Selection Process and Procedures

In an effort to control overdevelopment in the Town of Brookhaven, and to more effectively implement recent zoning code changes adopted under the administration of Supervisor John Jay LaValle, several members of the Town Board have proposed a series of code amendments that would alter the structure and procedures of both the Planning Board and the Zoning Board of Appeals. These proposals would allow for more diverse representation on the Boards, and also create additional opportunities for concerned residents to state their opinion on any issue pertaining to land use overseen by these boards.

"Diverse representation" needs to be expanded. We recommend that the boards be multi-partisan, with no more than four members on a board registered with one political party.

These initiatives are also meant to expand upon other related code changes recently adopted which increased the number of representatives on each board from five to seven, and decreased the length of a term from five to three years. In addition, the Board adopted amendments in May of this year that restricted executive committee members of political parties from serving on the Town Board, Zoning Board of Appeals, Planning Board, Assessment Review Board or Accessory Apartment Review Board.

Working in partnership with Civic organizations throughout the Town, Supervisor LaValle and Council Members Kevin McCarrick (the new liaison to the Planning, Building and Environmental Departments), Geraldine Esposito, James Tullo, and Timothy Mazzei crafted this legislation with the needs of Brookhaven's residents foremost in their mind. Over the past several months, there have been many concerns expressed regarding the context of the Planning and Zoning Boards, as well as the processes followed by the members. These initiatives are meant to more clearly define membership qualifications, and to compel public hearings necessary to encourage full disclosure on any issue. *Please share with your organization the details of this proposal, and communicate with us any thoughts that you may have. If you should have questions regarding the proposal, please contact the Supervisor's office at (631) 451-9100. We look forward to your input, both pro and con, and expect to schedule this matter for a public hearing as early as the July 13th meeting of the Town Board.*

Thank you in advance for your input. We look forward to our continued working partnership as we strive to make Brookhaven the best place to live, work and raise a family.

Following is a list of highlights from the proposed legislation:

- Does not change the current number of members on both the Planning Board and the Zoning Board of Appeals (current number of members on each board is 7)
- Would recruit prospective candidates through postings in newspapers and the Town's website
 - Candidates would be voted upon individually rather than the group approvals of the past
 - Candidates would have to appear before a public hearing of the Town Board for questions and answers, prior to being voted upon

Does this guarantee that the public has the opportunity to ask questions of the candidates?

Will all applicants be granted a public hearing? If not, how will it be determined which of the applicants are granted a public hearing and which ones are rejected? We recommend that all candidates be screened by a Selection Committee comprised of environmentalists, civic leaders, builders, and members of the press.

- Encourages diversity on the Boards by mandating a minimum of:
 - 1 Licensed Engineer
 - 1 Licensed Architect
 - 1 Member meeting any of the following criteria: Attorney, Environmentalist, Planner
 - 4 Members of the community-at-large, intimately familiar with communities within the Town and the governmental process

What criteria will be used to decide if an applicant is an "Environmentalist"?

What criteria will be used to decide if an applicant is a "Planner"?

We request that an Environmentalist (once that is defined) be one of the mandated positions (for a total of three mandated professionals), along with Engineer and Architect.

An alternative recommendation is that you require that three of the seven positions be filled by a combination of any three of following professionals: Engineer, Architect, Attorney, Environmentalist, Planner.

- Would change the time of public meetings from day to evening, in an effort to increase public participation (i.e., currently 9 am, change to 4 pm, 5 pm, or 6 pm start)

This is a welcome change.

- Would increase the area of notification from a 200 foot radius to 500 feet

We suggest increasing the radius to 1000 feet. We also recommend increasing the notification timing to two weeks prior to the hearing date.

- Would institute an attendance policy, wherein members may only miss 2 meetings and 2 work sessions per year, and thereafter be subject to removal at a public hearing of the Town Board
- Mandates certified educational training in Planning and Zoning, total hours to be determined
- Would require attendance at a minimum of 2 ethics seminars approved by the Town Board per term

These last three changes are all supported by ABCO.

We further recommend the following:

- ***All candidates must submit to background checks and provide financial disclosure.***
- ***No more than two board members (on each board) should reside in one Council District.***
- ***Stipends to board members should be increased to attract more qualified candidates.***

Who Do You Work For?

by C. Gregory Dale

As a planning commissioner you are part of your community's political world. As such, it should come as little surprise that you may be subject to pressures to show your political allegiances. Let me present a "hypothetical" situation:

You were appointed to the planning commission because of your strong relationship with the Mayor. You had worked with the Mayor on a variety of community issues over the years and developed a sense of mutual trust and friendship. When a vacancy arose on the Planning Commission, the Mayor asked if you would be interested. You agreed and were subsequently appointed by the City Council.

Now that you are on the Planning Commission, you find yourself in an awkward position. The Mayor, who perceives you as a friend and an ally, repeatedly calls you about issues appearing before the Planning Commission in an effort to influence your opinion and be sure that you understand the "Mayor's perspective." This seems natural to you since you are political allies, but you have the vague sense that there is something improper about these conversations. Is there an ethical issue? How should you respond to the Mayor?

This situation occurs frequently. In most cases, the motivations and intentions of elected officials engaging in these conversations are honorable. They simply are working within a political environment that they are accustomed to.

Nevertheless, there are several ethical issues to be aware of. First, as an appointed planning commissioner you are not designated to represent any special interest group. Neither are you appointed to represent the "voice" of an elected official. More specifically, as a planning commissioner you have an ethical obligation to remain in a position of objectivity and fairness. Your position should not be used to

seek political favors, nor should you create a perception that you are seeking political goodwill in your action. Any time you take a position at the urging of an elected official, you run the risk of tainting your credibility as an objective decision-maker.

In addition, contacts that you have outside of the public meeting process may fall in the category of "ex parte contacts." I previously discussed the problems associated with ex parte contacts (see PCJ, Issue #2) and will not repeat that discussion here. Suffice

ANY TIME YOU TAKE A POSITION AT THE URGING OF AN ELECTED OFFICIAL, YOU RUN THE RISK OF TAINTING YOUR CREDIBILITY AS AN OBJECTIVE DECISION MAKER.

it to say that information and opinions that influence your decisions when acting in a "quasi-judicial" capacity (for example, when reviewing development applications) should all be part of the public process.

There is no question that planning commission appointments are often made because of political or personal relationships. However, planning commissions are not (or at least, should not be) political bodies and are not there to represent particular interests.

OK, talk is cheap. The reality is that planning commissioners have political ties. How is this practice to be discouraged when it often is not perceived as being improper? I believe the answer lies in not waiting until a problem arises to address it. It pays to create an environment in which planning commission members are

expected to act according to high ethical standards. Your commission may wish to incorporate ethical standards into its bylaws, or to adopt a statement of ethical principles. The American Planning Association statement of ethical principles may provide a good starting point for your community.

If your commission has a reputation for holding itself to high ethical standards, then many ethical problems can be avoided. In the case I discussed, for example, the Mayor would know that efforts to influence planning commissioners on items pending before the commission simply are not acceptable.

The immediate problem still requires a response, however. When you face this type of situation, I believe you are obligated to tell the Mayor (and whoever else is making such contacts) that you would prefer they not try to influence your opinion outside the public process. Explain that they are putting you in a situation where you may be violating ethical principles of the planning commission. They should respect your position and refrain from such well meaning, but potentially damaging, contacts in the future.

As I have acknowledged in previous columns, planning commissioners often find themselves faced with ethical dilemmas that may be the result of well intentioned individuals trying to advance their own beliefs or interests. However, commissioners must constantly be sensitive to protecting their -- and the commission's -- integrity and credibility. ♦

C. Gregory Dale, FAICP, is a Principal with the planning and zoning firm of McBride Dale Clarion in Cincinnati, Ohio. Dale manages planning projects and also regularly conducts training for planning officials throughout the country. His column regularly appears in the Planning Commissioners Journal



Ethical Principles in Planning

(As Adopted May 1992)

This statement is a guide to ethical conduct for all who participate in the process of planning as advisors, advocates, and decision makers. It presents a set of principles to be held in common by certified planners, other practicing planners, appointed and elected officials, and others who participate in the process of planning.

The planning process exists to serve the public interest. While the public interest is a question of continuous debate, both in its general principles and in its case-by-case applications, it requires a conscientiously held view of the policies and actions that best serve the entire community.

Planning issues commonly involve a conflict of values and, often, there are large private interests at stake. These accentuate the necessity for the highest standards of fairness and honesty among all participants.

Those who practice planning need to adhere to a special set of ethical requirements that must guide all who aspire to professionalism.

The Code is formally subscribed to by each certified planner. It includes an enforcement procedure that is administered by AICP. The Code, however, provides for more than the minimum threshold of enforceable acceptability. It also sets aspirational standards that require conscious striving to attain.

The ethical principles derive both from the general values of society and from the planner's special responsibility to serve the public interest. As the basic values of society are often in competition with each other, so do these principles sometimes compete. For example, the need to provide full public information may compete with the need to respect confidences. Plans and programs often result from a balancing among divergent interests. An ethical judgment often also requires a conscientious balancing, based on the facts and context of a particular situation and on the entire set of ethical principles.

This statement also aims to inform the public generally. It is also the basis for continuing systematic discussion of the application of its principles that is itself essential behavior to give them daily meaning. The planning process must continuously pursue and faithfully serve the public interest.

Planning Process Participants should:

1. Recognize the rights of citizens to participate in planning decisions;
2. Strive to give citizens (including those who lack formal organization or influence) full, clear and accurate information on planning issues and the opportunity to have a meaningful role in the development of plans and programs;
3. Strive to expand choice and opportunity for all persons, recognizing a special responsibility to plan for the needs of disadvantaged groups and persons;
4. Assist in the clarification of community goals, objectives and policies in plan-making;
5. Ensure that reports, records and any other non-confidential information which is, or will be, available to decision makers is made available to the public in a convenient format and sufficiently in advance of any decision;
6. Strive to protect the integrity of the natural environment and the heritage of the built environment;
7. Pay special attention to the interrelatedness of decisions and the long range consequences of present actions.

Planning process participants continuously strive to achieve high standards of integrity and proficiency so that public respect for the planning process will be maintained.

Planning Process Participants should:

1. Exercise fair, honest and independent judgment in their roles as decision makers and advisors;
2. Make public disclosure of all "personal interests" they may have regarding any decision to be made in the planning process in which they serve, or are requested to serve, as advisor or decision maker (see also Advisory Ruling "Conflicts of Interest When a Public Planner Has a Stake in Private Development")

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3. Define "personal interest" broadly to include any actual or potential benefits or advantages that they, a spouse, family member or person living in their household might directly or indirectly obtain from a planning decision;
4. Abstain completely from direct or indirect participation as an advisor or decision maker in any matter in which they have a personal interest, and leave any chamber in which such a matter is under deliberation, unless their personal interest has been made a matter of public record; their employer, if any, has given approval; and the public official, public agency or court with jurisdiction to rule on ethics matters has expressly authorized their participation;
5. Seek no gifts or favors, nor offer any, under circumstances in which it might reasonably be inferred that the gifts or favors were intended or expected to influence a participant's objectivity as an advisor or decision maker in the planning process;
6. Not participate as an advisor or decision maker on any plan or project in which they have previously participated as an advocate;
7. Serve as advocates only when the client's objectives are legal and consistent with the public interest.
8. Not participate as an advocate on any aspect of a plan or program on which they have previously served as advisor or decision maker unless their role as advocate is authorized by applicable law, agency regulation, or ruling of an ethics officer or agency; such participation as an advocate should be allowed only after prior disclosure to, and approval by, their affected client or employer; under no circumstance should such participation commence earlier than one year following termination of the role as advisor or decision maker;
9. Not use confidential information acquired in the course of their duties to further a personal interest;
10. Not disclose confidential information acquired in the course of their duties except when required by law, to prevent a clear violation of law or to prevent substantial injury to third persons; provided that disclosure in the latter two situations may not be made until after verification of the facts and issues involved and consultation with other planning process participants to obtain their separate opinions;
11. Not misrepresent facts or distort information for the purpose of achieving a desired outcome (see also Advisory Ruling "Honesty in the Use of Information");
12. Not participate in any matter unless adequately prepared and sufficiently capacitated to render thorough and diligent service;
13. Respect the rights of all persons and not improperly discriminate against or harass others based on characteristics which are protected under civil rights laws and regulations (see also Advisory "Sexual Harassment").

APA members who are practicing planners continuously pursue improvement in their planning competence as well as in the development of peers and aspiring planners. They recognize that enhancement of planning as a profession leads to greater public respect for the planning process and thus serves the public interest.

APA Members who are practicing planners:

1. Strive to achieve high standards of professionalism, including certification, integrity, knowledge, and professional development consistent with the AICP Code of Ethics;
2. Do not commit a deliberately wrongful act which reflects adversely on planning as a profession or seek business by stating or implying that they are prepared, willing or able to influence decisions by improper means;
3. Participate in continuing professional education;
4. Contribute time and effort to groups lacking adequate planning resources and to voluntary professional activities;
5. Accurately represent their qualifications to practice planning as well as their education and affiliations;
6. Accurately represent the qualifications, views, and findings of colleagues;
7. Treat fairly and comment responsibly on the professional views of colleagues and members of other professions;
8. Share the results of experience and research which contribute to the body of planning knowledge;
9. Examine the applicability of planning theories, methods and standards to the facts and analysis of each particular situation and do not accept the applicability of a customary solution without first establishing its appropriateness to the situation;
10. Contribute time and information to the development of students, interns, beginning practitioners and other colleagues;
11. Strive to increase the opportunities for women and members of recognized minorities to become professional planners;
12. Systematically and critically analyze ethical issues in the practice of planning. (See also Advisory Ruling "Outside Employment or Moonlighting").

PLANNING BASIC TRAINING:

Ethics and Land Use - A Primer for Zoning and Planning Board Members

Avoiding Ethics Traps in Land Use Decisionmaking¹

Prof. Patricia E. Salkin

Albany Law School

Rocky Mountain Land Use Institute

Friday, March 8, 2002

Introduction

A growing body of caselaw and opinions from state attorneys general document a trend on the part of dissatisfied applicants and neighbors to lodge ethics allegations against members of planning and zoning boards. The good news is that in the majority of litigated cases the actions of municipal officials have been deemed to have been legal (which is not always the same as ethical, but nonetheless permissible under the law). The bad news is that municipalities are put in the position of costly defense litigation. In addition, mere the allegations of unethical conduct, the often negative headlines in the local paper and the increasing fear on the part of volunteer board members that their reputations will be unwittingly dragged through the mud, has left many municipalities with a lack of civic interest for service on these boards, and the publicity tarnishes the delicate balance of public trust and integrity in government that those in the public service strive hard to maintain. The obvious question to be answered is why is there so much focus on ethics issues in the land use context. The answer is simple. Big money is at stake for some applicants and public health, safety and welfare concerns are at stake for others who may simply disagree with the judgment of the members of planning and zoning boards.

This article focuses on issues and strategies for counseling municipal clients on the subject of ethical considerations that arise in the land use planning and zoning decisionmaking process. It is limited to a discussion of conflicts of interest, and it does not cover the unique ethical considerations faced by both full-time and part-time municipal attorneys with respect to professional conduct and ethics under the Code of Professional Responsibility or Rules of Professional Conduct. The discussion is organized around the major sub topics in conflicts of interest that have been the subject of opinions over the last five years.

Applicable Ethics Laws and Rules

Focusing on the municipal official as opposed to attorney ethical conduct can lead to a frustrating research path when attempting to find precise answers to the question at hand. In some states, there are ethics codes that apply specifically to municipal officials, and in a few situations there are specific provisions that deal with ethical issues in the planning and zoning arena. The local government ethics law must also be consulted, but beware that the types of ethics issues that arise in the land use context are rarely addressed in these laws. Sometimes there are specific provisions about conflicts of interest in the local zoning laws and ordinances. There may be applicable ethics committees and commissions that issue advisory opinions. At the state-level, more of these agencies are posting their opinions on-line, but at the municipal level research for precedential value may be more of a challenge. State attorneys general and comptrollers may provide opinions to municipal officials on matters involving ethics (specifically conflicts of interest and compatibility of dual office holding). Lastly, in analyzing any ethics situation that involves a licensed or certified professional, check for the possibility of applicable codes of ethics from these organizations (e.g., the American Institute of Architects, the American Institute of Certified Planners, the Society of Professional Engineers, the National Association of Realtors, etc.).

Conflicts of Interest

The most common ethics allegations revolve around real or perceived conflicts of interest. Conflicts of interest may be present where a board members could realize personal financial gain based upon a particular decision. Conflicts may also be present where a close blood relative of the land use decision-maker could be benefitted by a vote or action of a board member. Such benefit could be in the form of financial remuneration

¹ This article will appear in the March/April 2002 issue of *Municipal Lawyer*, published by the International Municipal Lawyers Association (IMLA).

PLANNING BASIC TRAINING:

Ethics and Land Use - A Primer for Zoning and Planning Board Members

from an individual or employer, and even present and future employment. Campaign promises and alleged bias resulting therefrom has also provided fertile grounds for allegations of unethical conduct. The discussion below briefly highlights some of the recent opinions in the area of conflicts of interest. For a more detailed discussion of these cases and opinions, as well as others, consult the references at the end of this article.

Personal Financial Gain

A decision of the zoning commission was challenged where a board member who owned a campground across the street from the proposed bituminous concrete manufacturing plant acted zealously in questioning the legality of the proposed use through conversations with the town planner, town attorney and an engineering firm, but withdrew from the commission and did not participate in the hearing on the site plan application.¹ In finding no conflict of interest since the board member withdrew, the court found nothing in state law that prohibits members not participating in a matter from presenting their own view on the subject.

In noting that the court would not consider “naked assertions” without knowledge of any facts, there was no personal financial conflict of interest where a member of a planning and zoning commission served as an electrical contractor for several projects with the applicant and where each of these jobs was won through a competitive bidding process.²

Where plaintiffs alleged that council members and board members had a conflict of interest in considering a requested conditional use permit based upon political campaign contributions, the court found nothing in the record to indicate any connection between contributions received seventeen months earlier.³

Familial Relationships

Sometimes, geographic proximity to property that is the subject of action before the board is cause for public concern. For example, it was determined that a city council member did not violate the conflict of interest provision in the applicable state statute when a neighbor opposed a rezoning application by his sons for their adjacent property from residential to light manufacturing.⁴ The court found that the council member properly disclosed his interest and disqualified himself from voting in the matter.

Where a zoning commission member appeared before the commission in her personal capacity after having excused herself from voting, and leaving her seat at the commission table to move to another area in the room so that she could advocate on behalf of a relative applicant where she was a co-applicant as an officer of applicant’s corporation, the court noted that nothing in state statute prohibited such action.⁵

A board member who voted on the siting of a shopping center to be located near where his elderly parents resided did not present a conflict interest because he allegedly had an interest in not having to shop for his parents.⁶ Yet in another case involving an elderly parent, the court found a prohibited conflict of interest where a board member voted on a variance request that would impact his 83-year old mother’s commercial interest based upon the “potential for psychological influences” because his mother needed the income to subsist.⁷

One court determined that a planning board itself is not necessarily infected with an alleged conflict of interest based upon a claim that a competitor applicant was locally favored because the competitor was represented by the spouse of a council member.⁸

No familial conflict of interest was found where two of the board members had family members who were connected in some way to the applicant University - one board member’s spouse was employed by the University (but not in any way connected to the application before the Board) and another was spouse of a retiree who received pension benefits.⁹

Political Pressure, Campaign Promises, Bias and Prejudgment

An alleged conflict of interest based upon political pressure was lodged by an applicant arguing that zoning board members were subject to undue political pressure when the township attorney appeared before them to oppose the application since the zoning board members are appointed by the township council who had directed the township attorney to appear before the board.¹⁰ No conflict was found since the attorney appeared on behalf of the public, not himself, and since the township council had no authority to review the

PLANNING BASIC TRAINING:

Ethics and Land Use - A Primer for Zoning and Planning Board Members

decision of the zoning board.¹¹

Based upon statements made by a councilwoman that could suggest the member favored youth issues, opponents challenged the decision of the city council to site a youth shelter on the grounds that this member was biased and had prejudged the matter, creating an appearance of impropriety and abolishing any chance of receiving a fair and impartial hearing on the matter.¹² In finding no conflict of interest or appearance of impropriety, the court noted that council members need not be so insulated from their community to the point that they must be detached from everything that comes before them.

Where two commission members participated in a hearing and decision regarding special permits for an outdoor soccer field after having been involved with little league ball fields committee to study the question of ball fields in town, the court said that this alone would not cause other commissioners to form prejudged conclusions as to their decisions in the matter.¹³ The court stated, "To hold otherwise would be to seriously limit the work of municipalities, who must rely on interested volunteers for much of their work. Such volunteers, by the very nature of their active involvement in their communities, are likely, from time to time, to have opinions about matters of public concern, which come before them."¹⁴

In another case, two planning board members actively supported a new supermarket in town during their pre-application when they were candidates for township committee. Finding insufficient evidence that they prejudged the application, the court stated, "[e]xpression in support of a general proposition during a prior political campaign does not invalidate a subsequent decision by campaigners acting in their official capacity as planning board members."¹⁵

The Land Use Ethics Checklist

To preserve the public trust, municipal attorneys have an obligation to proactively address and discuss ethics issues with municipal officials for the purposes of avoiding potential pitfalls in the future. Since few people are excited about the prospect of sitting through an evening lecture on the topic of ethics, municipal attorneys must be creative in their preventive law strategy. There are a number of subtle ways in which this training can take place. For example, bring in newspaper clippings from neighboring jurisdictions about ethics allegations and pass them around periodically with an "fyi" note. When interesting land use ethics cases are decided from other jurisdictions, bring in case summaries detailing the facts to remind board members about how the public may perceive their conduct. Periodically distribute a short ethics quiz based upon hypothetical fact patterns that offer several choices for solutions. Use this as a way to brainstorm with the board members on how they might handle the particular situation.

Another preventive law ethics technique is the planning and zoning checklist. Annually, ask board members (this could and should include members of local legislative bodies as well) to complete the following ten question checklist which can be varied to meet the needs of your municipality/region:

1. Have you reviewed a copy of the state ethics law in effect during the last 12 months?
2. Have you reviewed a copy of local ethics law in effect during the last 12 months?
3. Does your business relate in any way to issues which may come before the board on which you sit?
4. Could your business potentially benefit from or be harmed by a decision of the board on which you serve?
5. Are you or a member of your immediate family licensed or engage in any of the following professions which may cause you, your firm, or a family member to appear before the board on which you serve:
 - ☐ architect
 - ☐ attorney
 - ☐ builder, developer
 - ☐ engineer
 - ☐ land surveyor
 - ☐ mortgage broker/agent
 - ☐ realtor
 - ☐ subcontractor for work on new construction/remodeling
 - ☐ title insurance company
6. Do you hold investments in real estate within the municipality on whose board you serve?
7. Do you have stock or any other type of ownership interest (including a silent limited partnership interest) in any company or organization which may appear before the board on which you serve?

PLANNING BASIC TRAINING:

Ethics and Land Use - A Primer for Zoning and Planning Board Members

8. Are you related to, or in a business or professional relationship with, another municipal official on a different board or in an office where either position may review the decisions of the other?
9. Are you comfortable and conversant with the municipal/board policies on conflicts of interest, recusal from deliberations, and recusal from voting?
10. Do you know where to go to get answers to ethical questions in a timely fashion?

While answers to these questions may not trigger an immediate ethical dilemma, they put the individual board members as well as the municipal attorney on notice of areas where potential situations could require sound counseling for appropriate ethical and legal conduct.

For more information see:

Salkin, "Legal Ethics and Land-Use Planning," 30 *The Urban Lawyer* 383 (1998).
Salkin, "1998 Survey of Ethics in Land-Use Planning," 26 *Fordham Urb. L.J.* 1393 (1999).
Salkin, ed., *Ethical Standards in the Public Sector* (ABA Press 1999).
Salkin, "Municipal Ethics Remain a Hot Topic in Litigation: A 1999 Survey of Issues in Ethics for Municipal Lawyers," 14 *BYU J. Pub. L.* 209 (2000).
Salkin, "Litigating Ethics Issues in Land Use: 2000 Trends and Decisions," 33 *The Urban Lawyer* 687 (2001).

Endnotes

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1. *Phillips v Town of Salem Planning & Zoning Comm'n*, 1998 WL 258332 (Conn. Super. Ct. 1998).
 2. *Blinkoff v Planning and Zoning Commission*, 1999 WL 559585 (Conn. Super. Ct. 1999).
 3. *Breakzone Billiards v City of Torrance*, 97 Cal. Rptr.2d 467 (2000).
 4. *Little v City of Lawrenceville*, 528 S.E.2d 515 (Ga. 2000).
 5. *Leshine v Planning and Zoning Commission of the Town of Guilford*, 2000 Conn. Super. Ct. LEXIS 1278 (2000).
 6. *Lincoln Heights Ass'n v Township of Cranford Planning Board*, 714 A.2d 995 (N.J. Super. Ct. Law Div. 1998).
 7. *Ex. rel. Teneffly v Tenaflly Zoning Board of Adjustment*, 704 A.2d 1032 (N.J. Super. Ct. App. Div. 1998).
 8. *Masi Management, Inc. v Town of Odgen*, 691 N.Y.S.2d 706 (N.Y. Sup. Ct. 1999).
 9. *DePaolo v Town of Ithaca*, 694 N.Y.S.2d 235 (1999).
 10. *Paruszewski v Township of Elsinboro*, 711 A.2d 273 (1998).
 11. *Id.*
 12. *Siesta Hills Neighborhood Ass'n v City of Albuquerque*, 954 P.2d 102 (1998).
 13. *Brooks v Planning and Zoning Commission of the Town of Haddam*, 2000 Conn. Super. LEXIS 244 (2000).
 14. *Id.*
 15. *Lincoln Heights Ass'n v Township of Cranford Planning Bd.*, 714 A.2d 995, 1004 (1998).

Source: <http://ls.wustl.edu/landuselaw/salkin.pdf> downloaded 10/03/2004

NYS General Municipal Law

Article 18. Conflicts of Interest of Municipal Officers and Employees

§800. Definitions

When used in this article and unless otherwise expressly stated or unless the context otherwise requires:

1. "*Chief fiscal officer*" means a comptroller, commissioner of finance, director of finance or other officer possessing similar powers and duties, except that in a school district the term shall not mean a member of the board of education or a trustee thereof.
2. "*Contract*" means any claim, account or demand against or agreement with a
3. "*Interest*" means a direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves. For the purposes of this article a municipal officer or employee shall be deemed to have an interest in the contract of
 - (a) his spouse, minor children and dependents, except a contract of employment with the municipality which such officer or employee serves,
 - (b) a firm, partnership or association of which such officer or employee is a member or employee,
 - (c) a corporation of which such officer or employee is an officer, director or employee and
 - (d) a corporation any stock of which is owned or controlled directly or indirectly by such officer or employee.
4. "*Municipality*" means a county, city, town, village, school district, consolidated health district, county vocational education and extension board, public library, board of cooperative educational services, urban renewal agency, a joint water works system established pursuant to chapter six hundred fifty-four of the laws of nineteen hundred twenty-seven, or a town or county improvement district, district corporation, or other district or a joint service established for the purpose of carrying on, performing or financing one or more improvements or services intended to benefit the health, welfare, safety or convenience of the inhabitants of such governmental units or to benefit the real property within such units, an industrial development agency but shall have no application to a city having a population of one million or more or to a county, school district, or other public agency or facility therein.
5. "*Municipal officer or employee*" means an officer or employee of a municipality, whether paid or unpaid, including members of any administrative board, commission or other agency thereof and in the case of a county, shall be deemed to also include any officer or employee paid from county funds. No person shall be deemed to be a municipal officer or employee solely by reason of being a volunteer fireman or civil defense volunteer, except a fire chief or assistant fire chief.
6. "*Treasurer*" means a county treasurer, city treasurer, town supervisor, village treasurer, school district treasurer, fire district treasurer, improvement district treasurer, president of a board of health of a consolidated health district, county vocational educational and extension board treasurer, treasurer of a board of cooperative educational services, public general hospital treasurer, or other officer possessing similar powers and duties.

§ 801. Conflicts of interest prohibited

Except as provided in section eight hundred two of this chapter,

(1) no municipal officer or employee shall have an interest in any contract with the municipality of which he is an officer or employee, when such officer or employee, individually or as a member of a board, has the power or duty to:

(a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder

(b) audit bills or claims under the contract, or

(c) appoint an officer or employee who has any of the powers or duties set forth above and

(2) no chief fiscal officer, treasurer, or his deputy or employee, shall have an interest in a bank or trust company designated as a depository, paying agent, registration agent or for investment of funds of the municipality of which he is an officer or employee. The provisions of this section shall in no event be construed to preclude the payment of lawful compensation and necessary expenses of any municipal officer or employee in one or more positions of public employment, the holding of which is not prohibited by law.

§ 802. Exceptions

The provisions of section eight hundred one of this chapter shall not apply to:

1. a. *The designation of a bank or trust company* as a depository, paying agent, registration agent or for investment of funds of a municipality except when the chief fiscal officer, treasurer, or his deputy or employee, has an interest in such bank or trust company; provided, however, that where designation of a bank or trust company outside the municipality would be required because of the foregoing restriction, a bank or trust company within the municipality may nevertheless be so designated;

b. *A contract with a person, firm, corporation or association in which a municipal officer or employee has an interest* which is prohibited solely by reason of employment as an officer or employee thereof, if the remuneration of such employment will not be directly affected as a result of such contract and the duties of such employment do not directly involve the procurement, preparation or performance of any part of such contract;

c. *The designation of a newspaper*, including but not limited to an official newspaper, for the publication of any notice, resolution, ordinance or other proceeding where such publication is required or authorized by law;

d. *The purchase by a municipality of real property or an interest therein*, provided the purchase and the consideration therefor is approved by order of the supreme court upon petition of the governing board;

e. *The acquisition of real property or an interest therein*, through condemnation proceedings according to law;

f. *A contract with a membership corporation* or other voluntary non-profit corporation or association;

g. *The sale of bonds and notes pursuant to **section 60.10 of the local finance law**;*

h. *A contract in which a municipal officer or employee has an interest if such contract was entered into prior to the time he was elected or appointed as such officer or employee, but this paragraph shall in no event authorize a renewal of any such contract;*

i. *Employment of a duly licensed physician as school physician for a school district upon authorization by a two-thirds vote of the board of education of such school district, notwithstanding the fact that such physician shall have an interest, as defined in section eight hundred one of this chapter, in such employment.*

j. *Purchases or public work by a municipality, other than a county, located wholly or partly within a county with a population of two hundred thousand or less pursuant to a contract in which a member of the governing body or board has a prohibited interest, where:*

(1) the member of the governing body or board is elected and serves without salary;

(2) the purchases, in the aggregate, are less than five thousand dollars in one fiscal year and the governing body or board has followed its procurement policies and procedures adopted in accordance with the provisions of section one hundred four-b of this chapter and the procurement process indicates that the contract is with the lowest dollar offer;

(3) the contract for the purchases or public work is approved by resolution of the body or board by the affirmative vote of each member of the body or board except the interested member who shall abstain.

2. a. A contract with a corporation in which a municipal officer or employee has an interest by reason of stockholdings when less than five per centum of the outstanding stock of the corporation is owned or controlled directly or indirectly by such officer or employee;

b. A contract for the furnishing of public utility services when the rates or charges therefor are fixed or regulated by the public service commission;

c. A contract for the payment of a reasonable rental of a room or rooms owned or leased by an officer or employee when the same are used in the performance of his official duties and are so designated as an office or chamber;

d. A contract for the payment of a portion of the compensation of a private employee of an officer when such employee performs part time service in the official duties of the office;

e. A contract in which a municipal officer or employee has an interest if the total consideration payable thereunder, when added to the aggregate amount of all consideration payable under contracts in which such person had an interest during the fiscal year, does not exceed the sum of seven hundred fifty dollars.

f. A contract with a member of a private industry council established in accordance with the federal job training partnership act [FN1] or any firm, corporation or association in which such member holds an interest, provided the member discloses such interest to the council and the member does not vote on the contract.

[FN1] **29 USCA § 1501** et seq.

§ 803. Disclosure of interest

1. Any municipal officer or employee who has, will have, or later acquires an interest in any actual or proposed contract with the municipality of which he is an officer or employee, shall publicly disclose the nature and extent of such interest in writing to the governing body thereof as soon as he has knowledge of such actual or prospective interest. Such written disclosure shall be made part of and set forth in the official record of the proceedings of such body. Once disclosure has been made by an officer or employee with respect to an interest in a contract with a particular person, firm, corporation or association, no further disclosures need be made by such officer or employee with respect to additional contracts with the same party during the remainder of the fiscal year.

2. Notwithstanding the provisions of subdivision one of this section, disclosure shall not be required in the case of an interest in a contract described in subdivision two of section eight hundred two hereof.

§ 804. Contracts void

Any contract willfully entered into by or with a municipality in which there is an interest prohibited by this article shall be null, void and wholly unenforceable.

In 1987 the State Legislature adopted the "Ethics in Government Act" (L 1987, Chapter 813), which among other things, amended article 18 of the General Municipal Law (§ 800 et seq.) To provide for a system of annual financial disclosure of localities....

Town Ethics Code

Question: Should there be specific provisions in Code of Ethical Issues in planning and zoning area?

Conflict of Interest

Caution: Conflicts of Interest

C. Gregory Dale, AICP

Imagine the lead story in your local newspaper reading “the recent upheaval in the town planning department can be linked to one former planning commissioner whom critics say guided town zoning laws in a way that benefited at least one of his development proposals.”

Just such an article appeared recently in a New England newspaper. In spite of repeated denials by the commissioner in question, the issue set off a chain reaction that involved the resignation of the planning director, the “firing” of the entire planning commission, and an editorial criticizing the performance of the planning commission. The incident had to do with a commissioner participating in discussions over zoning text amendments that would have removed a setback requirement. This was perceived as clearing the way for him to develop his property with a hotel.

Interestingly, all involved agreed that the planning commissioner did not act illegally.

Conflicts of interest, and particularly the more common issue of *perceived* conflicts of interest, continue to be one of the thorniest problems facing local planning commissions. Unlike jurors who are selected on the basis of *lack* of knowledge about the subject, planning commission members are often selected based upon *having* knowledge of the community. This often means that commissioners are involved in local planning and development issues in one form or another.

This issue is particularly acute when a planning board member has an interest in developable real estate. While none of us like to think that we have given up some right by agreeing to serve on the planning board, the most sensitive ethical area involves a perception that a planning board member is acting in a way to advance his own interests in private property development.

As a planning commissioner you are a public official. As such your actions are sure to be under scrutiny by members of the public and by your local media. The slightest stumble in how you deal with ethical issues has the potential to flare up into controversy.

THE MOST SENSITIVE
ETHICAL AREA INVOLVES
A PERCEPTION THAT A
PLANNING BOARD
MEMBER IS ACTING IN A
WAY TO ADVANCE HIS
OWN INTERESTS

When in Doubt, Disclose

If you believe that you have a conflict of interest or a situation that could create the impression of a conflict of interest, the safest route is to disclose the nature of your concern to the planning commission. Be sure to make this disclosure before beginning discussion of the item.

Let the Commission Decide

Rather than an individual planning commissioner making a unilateral determination on conflict questions, consider establishing a procedure whereby a commissioner may request permission to be excused, or request permission to participate, and let the commission make the determination. This has several effects. First, it removes the burden from the individual. Second, it allows for the possibility that the commission may disagree with the individual commissioner's determination.

Err on the Side of Caution

When faced with a potential conflict, readily agree that you are willing to step aside if the commission so desires. Any insistence on your part to stay involved

will only create the impression that you have a reason “to stay involved.”

Keep it Simple: Leave the Room

Once a determination has been made that there is a conflict or potential conflict the simplest course of action is for that commissioner to simply leave the room.¹ Out of sight, out of mind. Continuing to sit silently with the commission or even moving to the audience is not good enough. Leave the room. (You can return later if there are other items on your meeting agenda). If the matter that creates a conflict has to do with development of your own property, try to have a representative appear on your behalf.

An Ounce of Prevention ...

As with many things in life, it makes sense to *plan* for contingencies. Take the time to become familiar with whatever legal restrictions involving conflicts of interest apply in your state. It may benefit your full commission to schedule an informal meeting or workshop with your city or county attorney to discuss hypothetical conflict of interest (and other ethical) concerns and how to deal with them. ♦

C. Gregory Dale, AICP, is Director of Planning with the planning and engineering firm of Pflum, Klausmeier & Gehrum, and works in their Cincinnati, Ohio office. Dale is also a past president of the Ohio Chapter of the American Planning Association, and frequent speaker at planning and zoning workshops.



¹ One occasionally used exception to disqualification for conflict of interest occurs when a planning board would otherwise lack the required number of members to take action on the matter before it. In such a situation, it may be acceptable for those members to participate (after they disclose the nature of their actual or perceived conflict) allowing the commission to take action. It makes sense to discuss how your commission will handle this kind of situation before it occurs

No Strings Attached?

by C. Gregory Dale, AICP

How do you handle gifts or other offers of value that are made to you in your capacity as a planning commissioner?

Consider this scenario. You are invited to attend a local sporting event by a developer who has a development approval pending before the planning commission. The offer involves dinner in the private box of the developer. What is your response? Does your response change if the invitation comes from a local developer who does not have an item pending before the commission? Does it change if the entire commission is invited?

There are many variations on this scenario. Some involve offers to travel to view similar projects by the same developer. Some involve offers to use facilities such as resort condominiums. Some involve something as seemingly harmless as a fruit basket delivered during the holiday season. Certainly developers are not alone in this area. How would you handle a weekend retreat invitation from a conservation group that is active in lobbying local governments?

All of these scenarios raise the same ethical issue. Is there an attempt being made to influence your vote or attitude

towards a particular project, individual, group, or issue? I believe the answer to this question for all of the scenarios described above is "yes."

Even the holiday fruit basket is being offered to engender good will. Remember that your job as planning commissioner is to be a dispassionate judge of

AS WITH MANY ETHICAL MATTERS, ONE OF THE BEST WAYS TO PREVENT THE PROBLEM IS TO DEAL WITH IT UP-FRONT IN YOUR REGULATIONS OR COMMISSION'S BY-LAWS.

factual evidence presented to you for the purpose of determining compliance with standards or policies adopted by the community.

Any effort to create good will or otherwise color your perception of an individual, company, or group outside of this process of factual consideration creates a clear ethical problem. In addition, as is always the case with ethical issues, the perception of impropriety is as damaging to your reputation and credibility as an actual case of wrongdoing. Acceptance of a gift may also create an atmosphere where even more such offers are made, damaging the planning process further.

It is human nature to enjoy gestures of appreciation. On the other hand, any offer of a gift should be viewed as tainting the process. In fact, it can be more serious than just an ethical problem. Remember that even though you are probably not getting paid as a planning commissioner, you are still considered a public official. Your state may deem your accepting something of value to be an illegal act.

How should one respond to the offer of a gift. First, let me state the obvious: the gift should be refused (and, if delivered to you, returned). Secondly, you may want to consult with your legal counsel. To the extent that the offer occurs outside of a public meeting, it may be viewed as an ex-parte contact — possibly requiring disclosure of the offer at your commission's meeting. [For more on ex-parte contacts, see my columns in PCJ #2 and 24].

As with many ethical matters, one of the best ways to prevent the problem is to deal with it up-front in your regulations or commission's by-laws. Consider clearly stating that gifts are unacceptable (or, perhaps, providing that nothing greater than two or three dollars in value can be accepted, allowing commissioners to accept something of nominal value, like a cup of coffee).

The acceptance of gifts or favors in your capacity as a planning commissioner is a serious matter. At best it taints the process and undermines your objectivity. At worst it may be a criminal act. ♦

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"On coming into public office, I laid it down as a law of my conduct, while I should continue in it, to accept no present of any sensible pecuniary value. ... [T]hings of sensible value, however innocently offered in the first examples, may grow at length into abuse, for which I wish not to furnish a precedent.

—Letter from Thomas Jefferson to Samuel Hawkins, 1808, sent in response to offered gift of an ivory staff. The Writings of Thomas Jefferson (Lipscomb & Bergh, eds.), Vol. 12, p.203.

Behind the Scenes Advocacy

by C. Gregory Dale

One of the most difficult challenges you face as a planning commissioner is to separate your role as a commissioner from your history of community involvement in many of the same issues that come before the commission. This column focuses on the ethical issues associated with the temptation many commissioners experience to work "behind the scenes." As usual, let me begin with an example.

Prior to joining the planning commission you were involved in a variety of community issues and worked very comfortably in the political process. You have always drawn on your values and beliefs to take positions that you believe are in the best interest of your community.

As a planning commissioner, you quickly realize that you are in a position to be particularly well-apprised about what's going on in your community, especially in terms of land use and development issues. This information is not of a confidential nature, but relates more to your knowledge of items coming before the commission, as well as your understanding of the personalities of individual commissioners.

You find yourself faced with several dilemmas. Should you "tip off" your friends to issues that you know would be of interest to them? Should you encourage the advocacy of certain positions before your commission? Should you work behind the scenes to help people better prepare their arguments and "cases" to be presented to the commission?

As I have noted in previous columns, you (and each of your colleagues) come to the planning commission with certain values, beliefs, and political orientations. No one is asking you to abandon these. On the other hand, by becoming a planning commissioner you are accepting allegiance to certain principles that transcend your personal political beliefs; these principles have clear ethical implications. When you

agree to serve on a planning commission you accept the obligation to treat all persons fairly, even if those persons happen to have radically different political viewpoints than you.

A COMMISSIONER'S
GREATEST ASSET
IS CREDIBILITY; ONCE
DAMAGED, THAT
CREDIBILITY MAY BE
IMPOSSIBLE TO RESTORE.

Is there anything wrong with your using your knowledge of commission affairs to advise friends of pending or future issues? Can you encourage individuals and groups to become active in planning commission affairs?

Clearly there is a benefit in public knowledge of matters before the planning commission. Likewise, encouraging advocacy before the planning commission simply makes for a more open and diverse process. However, you should not provide certain information to one group while withholding it from another, or selectively encourage participation only by those who share your views. While there is nothing wrong with your encouraging public participation, it is often best, if you have a planning director or staff planner, that they be the ones principally responsible for ensuring that all segments of the community are aware of pending or future items that may be of interest.

Is there a problem with your working behind the scenes to assist certain groups or individuals on matters pending before the commission? In a word, yes. First of all, it is very difficult for a commissioner to become involved in an issue and try to

keep that involvement "behind the scenes." Invariably that involvement comes out, often in the form of rumors and innuendo. A commissioner's greatest asset is credibility; once damaged, that credibility may be impossible to restore.

An even more serious problem raised when a commissioner becomes a "behind the scenes" advocate is that it implies that the commissioner has taken a position on a particular issue before it has been aired through the public hearing or review process. A fundamental tenet of commission deliberation is that commissioners should not make up their minds about a particular issue until all interested individuals have had an opportunity to state their positions and make their arguments.

When a commissioner is lobbying, either behind the scenes or openly for a particular position, that commissioner's vote is tainted. This can be damaging to the credibility of not just the individual commissioner, but the commission as a whole. It may also open the commission up to serious legal claims of violating due process requirements of fair and open decision making.

Accepting a position as commissioner includes an obligation to abide by certain ethical and due process rules of behavior. While you have not foregone your right to free speech by becoming a planning commissioner, you have accepted a larger responsibility to put the public interest before your personal political agenda. ♦

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Site Visits: Necessary But Tricky

by C. Gregory Dale, AICP

Consider this scenario. As part of your preparation for an upcoming planning commission meeting, you accept an offer from an applicant to tour a site that is subject to a zone change request. After all, how can you make a decision about a zone change without seeing the property, and who is better able to show you the property than the owner? However, as you are touring the site, you notice nearby residents suspiciously watching the tour from driveways and back yards. For reasons that you cannot fully explain, you feel guilty, as if you were doing something improper. Are you doing anything wrong?

In previous articles, I have discussed the concept of “ex-parte” contacts. Ex-parte contacts are those communications that occur outside the public forum. Before discussing site visits, it is helpful first to review the ex-parte issue, because it has a bearing on how to deal with site visits.

From a due process standpoint, planning commissions must provide equal access to information to all interested parties. If you are going to consider information in making a decision, then that information must be in the public realm, so that anyone has the opportunity to agree with or dispute it. As importantly, planning commissions must be careful not to give even the *impression* that they have information not available to the public.

Ex-parte contacts inevitably result in individual commissioners obtaining information that affects their decision making process. Simply disclosing the nature and content of the contact at a commission meeting does not solve the problem; no matter how complete your disclosure, it is unlikely to convey the full extent of the ex-parte discussion. Nor will disclosure erase the suspicions that many people have when they hear

about these contacts. For these reasons, I have always urged commissioners to avoid ex-parte contacts entirely. People should be encouraged to attend commission meetings to present their opinions in public.

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This is not to suggest that ex-parte contacts are necessarily illegal. In some states, under some circumstances, they may be. As always, I urge you to first check with your legal counsel to understand the law in your state or community. My concern is more with the *appearance* of impropriety. The integrity of your commission is paramount, and it does not take much for that integrity to be damaged.

What does this have to do with site visits? The answer is that site visits are, in fact, a form of ex-parte contact, in that they occur outside the public forum. On the other hand, they are a unique type of ex-parte contact, for several reasons. I believe that any reasonable person would agree that in order to make an intelligent decision about a particular property, a commission member must not only view the property, but the surrounding area as well. While many planning staff provide photographs or video of property and surrounding areas as part of their staff reports and presentation, this still cannot duplicate the personal experience of a site visit.

Thus, the issue becomes how to

conduct site visits while respecting the sensitivities of ex-parte contacts. My experience is that communities have successfully handled site visits in several ways.

First, the most straightforward approach is to conduct your own site visit alone. In most cases, a site visit can be done from the public right-of-way (i.e., from a car or the sidewalk). There is no need to take a guided tour of the neighborhood by a resident, or a guided tour of the property by the owner. Let’s face it: when someone wants to give you a guided tour, they are doing so to try to convince you to agree with their point of view. Similarly, when someone sees you on the “guided tour,” they are going to be suspicious, and that suspicion will reflect poorly on your role as an objective commissioner. If you walk the area and are approached by the applicant or neighbors, handle it in the same manner that I suggest you handle any other ex-parte contact: politely explain that you are not able to discuss a matter pending before the commission and encourage them to appear before the commission to express their viewpoint.

Also, take a moment at your meeting to disclose for the record that you made a site visit. It only makes you look that much more prepared.

In those cases where the size or features of the property, or the nature of the use makes it necessary to go onto the site, I suggest you have your staff make arrangements for a site visit. The staff should accompany you without the owner/applicant.

Some communities organize group site visits for their commissions. This can be helpful in that it ensures that everyone is seeing the same thing. However, this would typically be considered a public meeting that is subject to public notice. If your community is interested in this

approach, I urge you to work with your legal counsel to structure it in a legally defensible manner. For example, if you travel to a site in a single vehicle, you should not be discussing the merits of the case with each other. Also, you may need to make provision to allow others (such as the applicant, neighbors, and other interested citizens) to accompany you at the site. There are many "open meetings" aspects to group site visits that must be considered.

While site visits are a critical part of your preparations, like all matters of government they must be handled with caution. Be guided by two principles. First, understand what is legally acceptable in your community. Second, avoid any action that creates even an impression of impropriety. ♦

C. Gregory Dale is a Principal with the planning and zoning firm of McBride Dale Clarion in Cincinnati, Ohio. Dale manages planning projects and conducts training for planning officials throughout the country. He is also a former President of the Ohio Chapter of the American Planning Association.



Site Visit Guidelines

by Ken Lerner

Site visits are a critical part of the review process for major projects. Here in Burlington, Vermont, we formally announce the time and place of any site visit during the public hearing on a project. Members of the public are welcome to attend. In order to help avoid ex-parte contacts and inappropriate comments during the site visit, we have prepared "site visit guidelines" which are distributed to all those attending the site visit. In addition, either the commission chair or a staff member verbally summarizes the guidelines at the start of the visit.

Site Visit Guidelines:

1. Site visits should be conducted with a staff person in charge not the applicant, commissioner, or neighbor.
2. The commission chair and/or staff should explain the purposes and rules of the site visit at the beginning of the site visit to prevent misunderstandings.
3. The purpose of the site visit is to familiarize the commissioners with the site and how the proposed project fits into the site; it is not a hearing; statements and questions from neighbors should be presented at the hearing so that these can become part of the record; if the appli-

cant is willing, questions can be addressed to him or her at the end of the site visit.

4. Neighbors should refrain from side conversations with commissioners; this could be considered an ex-parte contact and result in a commissioner not being able to act on a project.
5. Commissioners should refrain from offering suggestions or opinions about the project during the site visit; such discussions should occur at the specific meeting or hearing scheduled on the project.
6. Specific commission concerns should be directed to staff so these concerns can be researched and addressed prior to action by the commission.
7. Abutters and other neighbors are encouraged to put their concerns in writing for the commission in advance of the scheduled meeting or hearing.
8. Staff should prepare a brief summary of the site visit as part of the record (which commissioners attended, etc.).

In conclusion, it might be helpful to keep in mind what a commissioner wisely stated on a recent site visit; that the applicant and interested parties should consider her a video camera and point and describe what they felt should be seen.

Ken Lerner is Assistant Planning Director for the City of Burlington, Vermont.



Online Comments:

"The distinction between commissioners and staff members is important to keep in mind. Typically, the staff's whole job is to engage in "ex-parte" contacts and information gathering, and then to help bring it into the public realm for commissioners (the decision makers) to deliberate on. Staff, applicant, and interested public at the hearing can be seen as the lawyers in a court case; the Board/commission is to act as judge/jury, and only respond to the "facts" as presented. Just as judges should not bring their own prejudices to a legal case, so too should a commissioner be wary about forming opinions based on information that is not presented to them (or by them) in the public forum."

— Ezra Glenn, Editor, New England Planning, Boston, MA

"Bully for Dale! The perception of impropriety is usually the murderous culprit that undermines the integrity of government; local, state and federal. Site visits are a must – that's a given.

If you can't learn to be an expert horseman by reading a book, how can you plan a quality community from behind a desk? The issue then becomes, 'How do you perform a site visit appropriately?' A governing body, and its appointed officials, get very few opportunities with the public trust – once that is violated you can't easily regain it. Be careful, deliberate and honest; to yourself and the process."

— J. Martin Sanchez, Senior Planner, City of McKinney, TX

"I frequently conduct site visits alone to observe conditions or issues expressed in the staff reports such as traffic, parking, road and drainage requirements, proximity to other uses and topography. I find I get a better feel for how a proposed use might perform if I can see the location three-dimensionally.

I avoid contact with anyone and don't enter the property. If an applicant or opponent tries to lobby me, I tell them it's not appropriate for me to receive information away from the other commissioners and that they need to bring any docu-

ments, photos, videos, neighbor's corroboration, etc., to the public hearing where all commissioners, the media and the public can hear it together. If a commissioner conducts a site visit, our legal counsel advises us to put it into the record up front, stating what we 'saw, did, heard, said or smelled,' as an observation, not a conclusion. In one instance a commissioner stated what he had seen only to discover he was looking at the wrong property! This just underscores the importance of disclosure. Opinions are to be formed or fine tuned after the public hearing."

— Frieda Camotta, Planning Commissioner, Lake County, California

"I found the article to be very informative and enlightening in that I don't think that the typical Plan Commissioner would consider a site visit ex-parte communications. It is important to bear in mind that ex-parte communications includes the neighbors and general public as well as the land owner or developer."

— Theresa R. Koehler, AICP, Planning Consultant, Peoria, Illinois

